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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 1325 77

ESTATE OF CHARLES NATHAN,
ROSE N. STRAUS, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Estate of Charles Nathan, Rose N. Straus, Executrix, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 11, 1947, reversing the decision of the Tax Court of the United States, and files herewith a certified copy of the complete transcript of the record in said cause and a Brief in support of this Petition.

Summary Statement of the Matter Involved.

This action involves the Federal estate taxes of the deceased, Charles Nathan, as to whether the corpus of a trust created by the decedent, less the value of a life estate, is includible in decedent's gross estate under the provisions of Section 811 (c)* of the Internal Revenue Code, where the donor predeceased the life tenant, and the contingency never vested.

The Tax Court of the United States disapproved the administrative construction of Section 811 (c) of the Internal Revenue Code as contained in Regulation 105, Section 81.18, and held that decedent's contingent reservation of the income for life did not make the corpus of the trust, less the value of the life estate, taxable under Section 811 (c) of the Internal Revenue Code, and judgment was rendered in favor of the petitioner. An appeal was taken by the Commissioner of Internal Revenue to the United States Circuit Court of Appeals for the Seventh Circuit, which Court reversed the decision of the Tax Court, and held that the decedent's estate was taxable under the administrative construction of said Section 811 (c) of the Internal Revenue Code as contained in Regulation 105, Section 81.18.

The facts of the case, so far as they are material to the consideration of the question presented, are as follows:

The decedent, Charles Nathan, on December 23, 1941, created an irrevocable trust wherein his niece, Gwendolyn Schoenstadt, and his nephew, Stanley Straus, or their survivors, were named the beneficiaries. The entire net income of the trust, however, was payable to

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*Text of statute appears on pages 10 and 11.

the donor's sister, Rose Straus, during her lifetime, and in the event she predeceased the donor, then the trust income was to be paid to him during his life (R. 14). Decedent died on April 11, 1943, and his sister, Rose Straus, survived him. The trust further provided that Rose Straus, during her lifetime, by and with the consent of the trustees, could alter or amend the trust agreement; and upon the demise of the said Rose Straus, Gwendolyn Schoenstadt, during her lifetime, has such right.

The respondent included the value of the trust corpus minus the value of the sister's life estate in decedent's gross estate under Section 811 (c) of the Internal Revenue Code, as a transfer in contemplation of death, and as a transfer under which the decedent retained, for his life, or for a period not ascertainable without reference to his death, or for a period which did not, in fact, end before a death, the possession or enjoyment of or the income from the property.

The Tax Court found that the transfer was not made in contemplation of death (R. 31), and no appeal was taken as to that issue.

Basis of Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 11, 1947 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347).

A.

There are in this case special and important reasons for this Court's intervention.

B.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

C.

The Circuit Court of Appeals for the Seventh Circuit has entered a decision in conflict with the dicta of another Circuit Court of Appeals, the Circuit Court of Appeals for the Second Circuit, on the same matter.

Question Presented.

Whether there should be included in the gross estate for purposes of the Federal estate tax, under Section 811 (c) of the Internal Revenue Code, the value of the trust corpus, minus the value of the sister's life estate, where the decedent, the donor, during his lifetime, transferred property, in trust, to certain designated beneficiaries, divesting himself of all right, title and interest in the corpus thereof, reserving a life estate to his sister with a provision that if the donor survived his sister, which he didn't, the trust income was to be paid to him during his life.

Reasons Relied on for the Issuance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court; that is, where the decedent made a transfer of property in trust for the benefit of his sister during her natural life, whereby the trust income was to be paid to her during her lifetime, and reserving a life estate for him-

self of the trust income, in the event his sister predeceased him, with the remainder over to his niece and nephew, and he predeceases his sister, whether under such circumstances, the value of the trust estate, less the value of the life estate of the sister, is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code.

2. The decision of the said Circuit Court of Appeals herein is contrary to the law applicable thereto.

3. The Circuit Court of Appeals has departed from the accepted and usual course of judicial construction of statutes, in that in construing statutes levying taxes, it is the established rule not to extend their provisions beyond the clear import of the language used, or enlarge their operations to embrace matters not specifically pointed out, and, in case of doubt, they are construed in favor of the citizens.

4. The judgment of the Circuit Court of Appeals is contrary to the law applicable thereto in reversing the decision of the Tax Court of the United States, and in holding that decedent's contingent reservation of the income for life, which contingency never vested, was includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the Circuit Court of Appeals

had in this cause, to the end that said cause may be reviewed and determined by this Court, and that the judgment herein of said Circuit Court of Appeals be reversed; and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

MYRON E. WISCH,
Counsel for Petitioner.

LOUIS R. KUPFER,
BENJAMIN B. CRANE,
Of Counsel.

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ESTATE OF CHARLES NATHAN,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The Tax Court of the United States on March 29, 1946, filed its decision, and it appears in the record at pages 29-34.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was rendered on February 11, 1947, and appears in the record at pages 51-56. It is reported in 159 Fed. 2nd 546.

Jurisdiction.

A statement of the jurisdiction is given in the petition (p. 2) and to avoid duplication is not repeated here.

Statement of the Case.

The facts are sufficiently stated in the petition, to which reference is made.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding and deciding that the corpus of a trust created by the decedent on December 23, 1941, less the value of a life estate therein of decedent's sistr, is includible in his gross estate for the purpose of Federal estate tax under the provisions of Section 811 (c) of the Internal Revenue Code.

2. In approving the administrative construction of Section 811 (c) of the Internal Revenue Code as contained in Regulation 105, Section 81.18.

3. In failing to hold that the reservation of the possibility of coming into a life estate does not amount to the retained estate contemplated by the Statute.

4. In failing to hold that where the transferor's contingent right to the trust income was obliterated by his death prior to that of the first life tenant, the transfer is not taxable.

5. In failing to confirm the decision of the Tax Court that the decedent's contingent reservation of the income for life did not make the transfer taxable under Section 811 (c).

6. In failing to confirm the decision of the Tax Court that the corpus of the Trust, less the value of the sister's outstanding life estate, is not includible in the decedent's gross estate for the purpose of Federal estate tax under Section 811 (c) of the Internal Revenue Code, where donor predeceased the life tenant, his sister, and the contingency never came into being.

7. In failing to confirm the decision of the Tax Court that the reservation by the decedent of the possibility of coming into a life estate does not amount to the retained estate contemplated by Section 811 (c) of the Internal Revenue Code.

8. In that the decision of the Circuit Court of Appeals is contrary to the law and to the Statutes.

Summary of Argument.

The Tax Court having found that the transfer was not made in contemplation of death, and the Commissioner indicating by his brief filed in the United States Circuit Court of Appeals, that no appeal is taken from this finding, the question as to whether the transfer was made in contemplation of death is a moot question and not in controversy.

A reservation in an irrevocable trust that the income shall go to the donor in the event the donor survives the life tenant. the donor having predeceased the life tenant, the corpus of the trust, less the value of the sister's outstanding life estate, is not includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code. The trust was irrevocable, and could only be altered or amended by the life tenant in conjunction with the trustee, or by the *cestui que* by and with the consent of the trustee. The transfer by the donor was immediate, and out and out, leaving no interest remaining in the donor. The donor of the trust predeceased the life tenant, and hence the contingency never could happen. The corpus of the trust by its very terms had no reference to his death, but is the same and unaffected whether he lived or died; nothing having passed at the donor's death, therefore, nothing is subject to a tax. The corpus of the trust property under no circumstances could ever revert to the donor.

ARGUMENT.

I.

There is no possibility of a reverter to decedent of any part of the corpus.

An examination of the Trust Agreement (Record 14) clearly indicates that the Trust Agreement is irrevocable; that at no time could the corpus of the trust revert to the donor; and that said Trust Agreement could only be altered, amended or revoked by the life tenant by and with the consent of the trustee, or upon the demise of the life tenant by the *cestui que* by and with the consent of the trustees. *Shukert* v. *Allen*, 273 U. S. 545.

II.

Decedent's transfer of property, in trust, to certain designated beneficiaries, reserving a life estate to his sister, with a provision that if decedent survives his sister, the income was to be paid to him during his life, and the decedent, having predeceased his sister, the corpus of the trust, less the value of the sister's outstanding life estate, is not includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code.

Section 811 (c) of the Internal Revenue Code provides:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made* a

transfer, *by trust or otherwise,* under which *he* has retained for his life or *for* any period *not ascertainable without reference to his death or for any period which does* not *in fact* end before his death (1) the possession or enjoyment of, or the *right to the* income from, the property, or (2) the right, *either alone or in conjunction with any person,* to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (For purposes of expediency, the amendments of joint resolution number 131, adopted March 3, 1931, and the amendments of 1932, are set forth in italics.)

The history of the Statute is enlightening. (Section 302 (c), as first inserted in the 1916 Act, and Section 302 (d), as subsequently inserted in the 1924 Act, were insufficient and inadequate to deal with the many plans of artifice and design to circumvent estate taxation. Section 302 (c) of the 1926 Act, which is substantially the same as Section 202 (b) of the 1916 Act, Section 402 (c) of the 1918 and 1921 Acts, and Section 302 (c) of the 1924 Act, was presented to this Court on numerous occasions and is dealt with extensively in:

Goldstone v. *U. S.*, 65 S. Ct. 1323.

Kline, et al. v. *U. S.*, 283 U. S. 231; 51 S. Ct. 398.

Helvering v. *Hallock*, 309 U. S. 106; 60 S. Ct. 444.

Fidelity-Philadelphia Trust Co. v. *Rothensies*, 324 U. S. 108; 65 S. Ct. 508.

May v. *Heiner*, 281 U. S. 238; 50 S. Ct. 286.

On March 1, 1931, this Court decided the cases of *Burnett* v. *Northern Trust Company,* 283 U. S. 782; *Morsman* v. *Burnett,* 283 U. S. 783; and *McCormack* v. *Burnett,* 283 U. S. 784, which held in no uncertain terms, that an irrevocable transfer in trust was not a transfer "intended to take effect in possession or enjoyment" at the settlor's death, even though the income was reserved to the settlor for life.

On the day following these decisions, Congress speedily enacted joint resolution 131, amending Section 302 (c). Subsequently, Congress again amended Section 302 (c), with a very slight verbal difference, by Section 803 of the 1932 Act. The act now stands on the books of the Internal Revenue Code as Section 811 (c). This section has never been presented to this Court for an interpretation of the amendatory features of Section 302 (c), except on the question as to whether these amendments were retroactive in their scope. *Hassett* v. *Welch,* 303 U. S. 303; 58 S. Ct. 559. However, the question of a contingent reversionary interest of a life income has been passed upon by this Court in the case of *Helvering* v. *St. Louis Trust Company,* 296 U. S. 39, decided November 11, 1935. Mr. Justice Sutherland, in delivering the opinion of this Court, at page 43, said:

> "If, therefore, no interest in the property involved in a given case pass 'from the possession, enjoyment or control of the donor at his death,' there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the exe-

cution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"'It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility.'

"It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place."

While it is true that Section 302 (c) was the gist of the decision in this case, it is to be noted that this case was decided four (4) years after the adoption of joint resolution 131, and three (3) years after the adoption of Section 803 of the 1932 Act, and is distinguished from the *Hassett* v. *Welch* case, *supra*, in that the question of the retroactivity of the amendments was not discussed by this Court. In the consideration of the *Helvering* v.

St. Louis Trust Company case, it was decided on the issue as to a possible contingent reversion to the donor.

Our Courts have shown a disinclination to hold an *inter vivos* transfer as part of the taxable estate. The fortunes of war have been, on the whole, against the Government and in case of doubt, they are construed against the Government and in favor of the citizen. The trend of the latest decisions is to the effect that a transfer is not taxable under Section 811 (c) of the Internal Revenue Code, unless the death of the grantor was the intended event which brought the larger estate into being for the grantee. Paul Federal Estate and Gift Taxation, Volume 1, pages 243-245, Paragraph 602.

The mere possibility of a contingent reversion, either by rule of law or by provision in a Trust Agreement, is not sufficient to make a transfer taxable if the grantor did not possess any string or tie whereby he could pull the res back to him or invade the corpus. Prentice-Hall Federal Tax Service 1946, paragraph 23599.

A better construction of Section 811 (c) would be that the corpus should be included in the gross estate of the decedent and not the income, because the corpus at the time of the transfer is in being, whereas the income is indefinite, problematical and not in being at the time the transfer is made.

The transfer of the property in the Nathan trust was complete and final. The transfer was immediate and out and out, leaving no interest remaining in the grantor.

The donor retained no power to alter or amend the terms under which the trust was to be administered. The donor retained no control whatsoever. The trust was for a definitely stated period, beginning and ending without reference to the date of his death.

In the case of *Allen* v. *Trust Co. of Georgia,* 66 S. Ct. 389, decided by this Court on the 28th day of January, A. D. 1946, we have a very striking example of the trend which not only the lower Courts are taking but even this Court, and which bears out the statement that the cases clearly show a disinclination to hold that *inter vivos* transfers are part of the taxable estate.

The Tax Court of Appeals maintains its position that where there is only a reservation of the contingent right to the income, this is not the basis for the inclusion of the corpus of the trust into the gross estate of the decedent. *Estate of Charles Curie* v. *Commissioner,* 4 T. C. 1175 (1945).

In the case of *Commissioner* v. *Hall,* C. C. A. 2, Prentice-Hall Federal Tax Service 1946, Paragraph 72.341, Mr. Justice Swan of the Second Circuit again enunciates the rule of law, "The Commissioner's argument that because the grantor reserved the net income for life the corpus is taxable under paragraph 302 (c) cannot prevail in this Court."

In endeavoring to interpret the amendments in Section 302 (c), the question presents itself, is the tax contemplated under the Statute a property or an excise tax? Was the death of the donor the indispensable and the intended event? Was his death the generating cause of the shifting of any benefit or interest?

We believe that all of these interrogatories must be answered in the negative. No economic benefit from the trust had become vested in Charles Nathan prior to his death. Hence, none passed from him at the time of his death.

If the *inter vivos* transfer by Charles Nathan to his trustees in 1941 was not intended to take effect in possession or enjoyment at his death, can it then be argued

that it was intended to take effect after his death and within the purview of Section 811 (c)? Certainly not. The contingent possibility of a reverter was beyond the grantor's control. The grantor died before the contingency occurred, and had made a complete transfer when the trust was created and not a transfer intended to take effect in the possession or enjoyment at his death or after his death. The grantor's death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it.

Any donor is obliged to file a gift tax return and is charged with 100% of the value of the property under the Gift Tax Law; and rightfully so, because a donor divests himself of all right, title and interest in the corpus of the transferred property. After the death of said donor, can it be said the property should not have been assessed for tax, and credit the donor's estate with the tax collected, as the transferred property, and then include the same in his estate? It must be remembered that the trust was not made in contemplation of death. Did Congress in its enactment of Section 811 (c) of the Internal Revenue Code intend to place an excise tax on a possible and contingent remainder where the trust was not made in contemplation of death, or was it intended to make circumvention of an estate inheritance tax more difficult and less likely? The Statute says the *inter vivos* transfer must be intended to take effect after death. The transfer in the Charles Nathan trust took effect immediately. The income was distributed to his sister, Rose Straus, immediately and has continued until the present time without regard to Charles Nathan's death. His death has caused no variation whatsoever in the operation and workings of the trust.

In the Hallock decision, Justice Frankfurter said:

> "Whether the transfer made by the decedent in his lifetime is 'intended to take effect at or after death' by reason of that which he retained is the crux of the problem."
>
> • • •
>
> "Section 302 (c) deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos.*"

Here we see this Court, speaking through Justice Frankfurter, going absolutely back to the *inter vivos* transfer. Is there a string tied to the transfer? That which grantor retained is "the crux of the problem". If the transfer is so set up where the death brings the same into enjoyment, then the tax is measured by the value of the transferred property at the time of death. But if nothing is retained by the grantor at the time of the transfer, then there is nothing upon which the taxing statute may operate. How by any stretch of the imagination did Charles Nathan have a string attached to the corpus of the trust? Absolutely nothing was retained by Charles Nathan, since we do not get as far as the "crux of the problem", because there is no problem in this case.

In the *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, 65 S. Ct. 505 (1945), the Supreme Court said:

> "The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter.
>
> "The ultimate disposition of all the trust property was suspended during the life of the decedent."

In the Nathan trust there was absolutely no suspension of the enjoyment of any beneficial interest dependent

upon the life of Charles Nathan. Although the corpus passed immediately at the creation of the trust regardless of the time when Charles Nathan died, he did not divert any part of the corpus or income from any intended beneficiaries named in the trust. The trust could have been amended even during his lifetime by the life tenant in conjunction with the trustee, or by the *cestui que* and the trustee, that the income should go to the beneficiaries upon the death of the life tenant. What then is the measure of the tax? Is it the date of the possible severance by the persons authorized in the trust indenture to make such severance, or is it the death of the donor? We believe that it is manifest from the decisions and the statutes that the *animus* of Congress was the inclusion of property in the gross estate where there is the power to alter, amend, revoke or terminate the indenture in the decedent alone or by the decedent in conjunction with any other person or persons. But where the power to alter, amend, revoke or terminate is vested solely in others, then the property is not to be included in the gross estate of the decedent. The decision of the Supreme Court in the *Fidelity-Philadelphia Trust Company* case is important in its exclusion as applied to the facts in the Nathan trust.

Was the *inter vivos* transfer in the Nathan Trust resorted to as a substitution for a will? The facts surrounding the creation of the Nathan Trust was found to have been made not in contemplation of death.

Never in the history of Federal Estate Tax laws did a court of law tax a contingent interest as to income, where the contingent interest never came into actual being prior to death. The possibility of any reversion to Charles Nathan's estate of the transferred property is absolutely nil. Charles Nathan divested himself of all

right, title or interest in the trust corpus, could never receive the res back or invade the corpus. He disposed of his interest in the corpus of the trust as well as any person could do, and his death did not in any way affect the interests of the beneficiaries of the trust, and nothing passed from him to them by reason of his death. Charles Nathan's death gave no dominion over the trust corpus that all beneficiaries did not have and enjoy before his death.

As far back as 1900 in the case of *Knowlton* v. *Moore*, 178 U. S. 41, the Supreme Court speaking through Mr. Justice White, after reviewing the history and form of death duties said:

> "Although different modes of assessing such duties prevail, and although they have different accidental names * * * nevertheless tax law of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that is the power to transmit, or the transmission from the dead to the living, in which said taxes are more immediately rested * * * Confusion of thought may arise unless it is always remembered that fundamentally considered, it is the power of the transmission or receipt of the property by death which is the subject levied upon by all death duties."

It is therefore respectfully urged that the Commissioner's argument that because the grantor reserved the net income for life, the corpus is taxable under the regulations excluding the value of the sister's outstanding life estate has never prevailed, and does not prevail in all of the cases cited in the Brief for the Petitioner, nor should it prevail under the Supreme Court decisions handed down ever since the Estate Tax Law was enacted and promulgated.

The transfer by Charles Nathan in 1941 was immediate and out and out, leaving no interest remaining in

Charles Nathan. The corpus of the trust in its very terms has no reference to his death, but is the same and unaffected whether he lived or died. Nothing passed at Charles Nathan's death. Therefore, nothing is subject to a tax.

III.

Treasury Regulation 80, Article 18, and Treasury Regulation 105, Article 81.18, are an invalid exercise of power by the Commissioner in that said regulations were never approved or adopted by Congress, although several sessions of Congress were held since the date of the promulgation of these regulations by the Commissioner.

The question of the validity of Treasury Regulations 80 and 105 depends upon the construction given Section 811 (c), and, more particularly, to that part,

> "To the extent of any interest therein of which the decedent has, at any time, made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property * * *."

Mr. Justice Evans in deciding the *Nathan* case in the United States Circuit Court of Appeals for the Seventh Circuit says:

> "We think it clear that said Regulation cannot be upheld unless we give to the statute a breadth which requires us to say the contingent estate retained by Nathan was for his life or for a period not ascertainable without reference to his death—or was for a period which does not in fact end before his death.

"It would be outside the power of the Commissioner to extend the liability of this transfer for taxation beyond that designated in the statute. We say this notwithstanding the Regulation was promulgated in 1937 and numerous sessions of Congress have come and gone without its approving, revising, or disapproving the Regulation.

"We find ourselves then unable to pass upon the validity of the Regulation without construing the above-quoted language of the statute.

"The doubt, if any, exists in this case, is over the question, was the property which was transferred and in which deceased retained a contingent life interest, terminable by his death or by that of his sister? Stated differently, was the period during which his contingent estate therein existed ascertainable without reference to his death or did the period of the contingent estate which decedent retained in the trust he created have a possible ending before his death?

"Notwithstanding some doubt (in view of the discussion in the Curie case) we hold the language of the statute must be so construed as to impose an estate tax on the property covered by this trust, less the value of the life estate of the sister. Our decision is not predicated on the Regulation. It is made necessary by the statute which, without the Regulation, imposes the tax.

"The Commissioner could not have found or held otherwise. The transfer in which the deceased retained a contingent estate was held by him for a period which did not in fact end before his death. It was his death, not his sister's death, which terminated his contingent interest.

"The trend of legislation imposing taxes on trusts created to take effect upon the settlor's death, the income in the meantime to run to the settlor, directly or even contingently, has been in one direction.

"The effect of the changes in the Federal estate tax statute and which ultimately found expression in Sec-

tion 811 (c) has been to enlarge the taxable estate of one who in his lifetime transferred all or part of his property in trust, the transfer to take effect on his death. The decisions of the courts have been given effect to the evident purpose of Congress. *Commissioner* v. *Spiegel,* decided by this court, December 28, 1946 (159 Fed. 2nd 257); *Commissioner* v. *Field,* 324 U. S. 116; *Fidelity Co.* v. *Rothensies,* 324 U. S. 111; *Helvering* v. *Hallock,* 309 U. S. 106.

"The inclusion of that part of the statute here under consideration is traceable to a start by Congress, in the Revenue Act of 1926. In other words, to Section 302 (c) of the Act of 1924 there was enacted an amendment in 1926, also found in Section 302 (c). This section was amended in 1932 and became Section 811 (c).

"The effect of these amendments was to enlarge the property upon which the estate tax was assessed. Its heading indicated its purpose. In other words, it dealt with 'transfers in contemplation of, or taking effect at death.' It included transfers which took effect at the death of a settlor of a trust, and evidenced the purpose of Congress to include all transfers which may be described broadly as testamentary in character.

"The factual difference between the instant case and the usual trust agreement which may be called testamentary has not been ignored. The decedent here retained only a contingent estate which became effective in case he survived his sister. Notwithstanding this rather important fact so far as enjoyment is concerned, it did not take the transfer out of the reach of the language of Section 811 (c) which controls our decision. We cannot lessen the effect or the meaning of the words because the settlor's interest was less certain or the enjoyment of the estate reserved more remote. We feel we must give the words used their fair, rightful meaning and we cannot make them depend on the size or nature of the settlor's reservation appearing in his transfer.

> The vital test of said reservation in settlor's favor necessitates an answer to the query—was the transfer one which was for a period not ascertainable without reference to his death?"

This decision reverses the decision of the Estate of Charles Nathan in the Tax Court of the United States (6 T. C. 78).

Judge Kern, who wrote the opinion in the *Nathan* case, refers to the *Curie* case in which he said that the same principle had been decided adversely to the ruling of the Commissioner. . The Commissioner sought to differentiate the *Nathan* case from the *Curie* case by pointing out that at all times pertinent to the *Nathan* case, Regulations 80, Article 18, Regulations 105, Article 81.18, were in force, whereas at the time the *Curie* case was decided, the ruling of the department found in E. T. 5 C. B. XIII-2, p. 369 was in effect.

Judge Kern says that the only difference is the change in the administrative ruling.

Regulation 80 was printed in 1937, and Regulation 105 in 1942. C. B. XIII-2 appeared in July-December, 1934.

He states that in the *Curie* case the Tax Court specifically approved the administrative construction of the statute contained in the Cumulative Bulletin and unmistakably disapproved the construction contained in the department's later regulations. He further states that the disapproval was not to the retroactive application to the trust involved in the *Curie* case but was to the effect that it was not supported by the legislative history of the section of the statute there and here involved.

Judge Kern refers to the case of *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110. This was an income tax case; but the Supreme Court of the United States, speaking through Justice Roberts, expressed the

opinion that where legislation had re-enacted certain statutory provisions which had been in existence and pursuant to which certain regulations had been issued such re-enactment gave to such regulations the force of law.

It is respectfully urged that since there had been no subsequent enactment since March 3, 1931, the Commissioner could not claim that his subsequent regulations in 80 and 105 had had the stamp of approval of subsequent legislative enactment, and, hence, had not acquired the force and effect of law as referred to in the Reynolds decision. In the *Curie* case the Tax Court arrived at the conclusion that the reservation of the possibility of coming into a life estate did not amount to such a retained estate as was contemplated by the statute. Therefore, the taxpayer should prevail.

Judge Kern further commenting upon the *Curie* case, *ante,* stated that Regulation 80, Article 18, and Regulation 105, Section 81.18, did not represent an administrative construction of the statute which had been uniform or of long standing, and since there had been no re-enactment of the statute subsequent to the change of the regulations, which might be construed as legislative approval of such change, the regulations did not control the court in its opinion. He further stated that the inclusion of the statutory provision, in question, in the Internal Revenue Code was not to be considered as such subsequent enactment so as to give the regulation the effect of law. He referred to the *Helvering* v. *Hallock* case, 309 U. S. 106.

The Tax Court considered its action in the *Curie* case correct, without giving great weight to the later administrative construction. It is true that in the *Curie* case a retroactive application of the new and changed regulation was involved, but as pointed out in the Tax Court's

decision, the same was not based upon the retroactivity of the regulation but upon the conclusion that the regulations did not construe the statute correctly.

Judge Kern said he saw no reason to arrive at a different conclusion in the *Nathan* case.

We believe that from the authorities herein submitted, the decision of the Tax Court should prevail. The transfer was an *inter vivos* transfer that took effect immediately. The possibility of a contingent reversion could have been immediately terminated by the life tenant and trustee immediately after the creation of the trust, which clearly illustrates that the death of Charles Nathan was not the indispensable and intended event.

Conclusion.

1. The decision of the Tax Court should be sustained and that of the United States Circuit Court of Appeals for the Seventh District reversed.

2. There is no inclination by the courts to sweep into the gross estate the *corpus* of trust or transfers *inter vivos* where a contingent right to income only is provided. Taxing of this type of transfer is fully covered by the Gift Tax Law.

3. The death of the grantor must be the indispensable and the intended event which brings the larger estate into being for the beneficiary. The death of Charles Nathan brought nothing into being. It caused no shifting of any economic interest, hence there is nothing to justify the imposition of the tax.

4. The transfer was immediate, out and out, and possession or enjoyment was not held in suspense awaiting the death of Charles Nathan.

5. The transfer was not intended to be a substitute for a final disposition of the grantor's property. It was not made in contemplation of death, and there was absolutely no element of suspense involved. Hence, it was not within the purview of Section 811 (c).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1325

ESTATE OF CHARLES NATHAN, ROSE N. STRAUS, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing (R. 31–33) and dissenting (R. 33–34) opinions in the Tax Court are reported at 6 T. C. 604. The opinion of the Circuit Court of Appeals (R. 51–56) is reported in 159 F. 2d 546.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 11, 1947. (R. 57.) The petition for a writ of certiorari was filed on May 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent in 1941 created a trust in which his sister was named life beneficiary. The trust provided that if the decedent survived his sister, the trust income was to be paid to him during his life. Upon the death of the decedent and his sister there were remainders over. The decedent died in 1943 during the lifetime of his sister. The question is whether there should be included in the gross estate for purposes of the federal estate tax, under Section 811 (c) of the Internal Revenue Code, the value of the trust corpus, minus the value of the sister's life estate.

STATUTE AND REGULATION INVOLVED

These are set out in the Appendix, *infra,* pp. 13–14.

STATEMENT

The Tax Court found the following facts (R. 29–31):

The decedent, on December 23, 1941, created a trust wherein his sister, Rose Straus, was designated as the primary or original beneficiary. (R. 29.)

The trust agreement contained the following provisions (R. 29–31):

> 2. The entire net income from the trust estate, commencing at the date hereof, shall be paid to Rose Straus, the sister of the donor, for and during her natural life

for her sole use and benefit, in installments as hereinabove stated. In the event, however, of the said Rose Straus predeceasing the said donor, Charles Nathan, then and in such event the net income shall be paid over by the trustees to the said donor, Charles Nathan, for and during his natural life for his sole use and benefit, in installments as hereinabove stated.

3. Immediately upon the death of the said Rose Straus and Charles Nathan, any income which accrued prior to the death of said Rose Straus or Charles Nathan, and which was not paid over to them or to the survivor of them, as herein provided, during his or her lifetime by the trustees, shall become part of the corpus of the trust estate, and the said trustees shall divide said trust estate into two (2) equal shares or portions, and shall hold said shares or portions in trust, as hereinafter provided:

* * * * *

The decedent died on April 11, 1943. His sister Rose Straus, survived him. (R. 31.)

The Commissioner determined that the value of the corpus of the trust, less the value of the life estate of the decedent's sister, Rose Straus, which preceded the right to receive the income from the property retained by the decedent, is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code as a transfer in contemplation of death and as a

transfer under which the decedent retained for his life or for a period not ascertainable without reference to his death, or for a period which did not, in fact, end before his death, the possession or enjoyment of or the income from the property. (R. 12–13, 31.)

The Tax Court found that the transfer was not made in contemplation of death (R. 31) and no appeal was taken as to that issue.

The Tax Court also held (R. 33), three judges dissenting (R. 33–34), that the decedent's contingent reservation of the income for life did not make the transfer taxable under Section 811 (c), and that is the issue with respect to which an appeal was taken. The Circuit Court of Appeals reversed. (R. 56.)

ARGUMENT

The Circuit Court of Appeals held, correctly, we submit, that the value of the trust property, less the value of the sister's outstanding life estate, is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) which provides specifically for the inclusion in the grantor's gross estate of trust property, donatively transferred, where he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death the possession or enjoyment of, or the right to the income from, the property.

These specific provisions came into the law by amendments passed in 1931 and 1932. While they are not retroactively applicable to transfers made prior to their enactment (*Hassett* v. *Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering* v. *Bullard*, 303 U. S. 297). The instant transfer was made in 1941, and it is therefore subject to the amendments.

Since the instant decedent retained the right to the trust income for his life if he should survive his sister, the first life tenant, we believe it necessarily follows that he reserved the right to the income for a period in the ascertainment of which the date of his death was a necessary element, and therefore the transfer is within the scope of the statute. The decision of the Circuit Court of Appeals below is in harmony with that view and so are the various regulations issued from March 18, 1937, to date. See Article 18, Treasury Regulations 80 (1934 ed.), as amended by T. D. 4729, 1937–1 Cum. Bull. 284, 285, approved March 18, 1937; Article 18, Treasury Regulations 80 (1937 ed.), approved October 26, 1937; Article 18, Treasury Regulations 80 (1937 ed.), as amended by T. D. 4868, 1938–2 Cum. Bull. 355; Section 81.18, Treasury Regulations 105, Appendix, *infra*.

Article 18 of Treasury Regulations 80 (1934 ed.) as originally promulgated was silent as to this situation, but a ruling made in 1934 (E. T. 5, XIII—2 Cum. Bull. 369), provided (p. 371)

that if the transferor was at the date of his death in the actual enjoyment of the income of the trust, the transfer should be subjected to tax; and, where the transferor's contingent right to the trust income was obliterated by his death prior to that of the life tenant, the transfer is not taxable. However, that ruling did not have the force and effect of a Treasury Regulation (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 468), and in any case it has long since been superseded by the regulations above referred to; it should therefore be disregarded here.

As noted by the Circuit Court of Appeals below (R. 53) the case of *Estate of Curie* v. *Commissioner*, 4 T. C. 1175, upon which the taxpayer relies (Pet. 15, 23–25) is distinguishable because there the transfer which the Commissioner was seeking to tax had been made in 1935 and the decedent's death occurred in 1936; and at both of those dates E. T. 5, which ruled against the tax, was in effect. In the instant case, on the other hand, the transfer was made in 1941 and the decedent died in 1943, and the regulation in effect at both of those dates provided for taxation in such cases.

We submit that the present administrative interpretation, being reasonable and consistent with the statute (*Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134), should be upheld and that the majority of the Tax Court in rejecting it (R. 33) committed a serious error, which the Circuit

Court of Appeals properly corrected by reversing the Tax Court's decision. Here the situation is not unlike the ones in *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, and *Helvering* v. *Reynolds*, 313 U. S. 428, where this Court held that the administrative interpretation can be changed prospectively through exercise of appropriate rule-making powers.

The Committee Reports on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46–47 (1939–1 Cum. Bull. (Part 2) 457, 490–491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49–50 (1939–1 Cum. Bull. (Part 2) 496, 532), support our views. They read in part as follows:

> The purpose of this amendment to section 302 (c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.
>
> The changes are:
>
> (1) The insertion of the words "or for any period not ascertainable without refer-

ence to his death," is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

(2) The insertion of the words "or for any period which does not in fact end before his death," which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

(3) The insertion of the words "the right to the income" in place of the words "the income" is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change.

We submit that the instant case is one where the decedent reserved the right to the income for a period in the ascertainment of which the date of his death was a necessary element, and the

regulations have been in harmony with this view for the past ten years.

It is true that the Committee Reports do state that the insertion in the statute of the words "or for any period which does not in fact end before his death" was designed to reach, for example, a transfer where decedent, seventy years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. But as pointed out in the dissenting opinions in the Tax Court (R. 33–34), that language has no bearing upon whether this case is covered by the other clause which deals with transfers where there is a reservation "for any period not ascertainable without reference to his [the grantor's] death." And here there was clearly such a reservation.

Moreover, it will be remembered (see *Hassett* v. *Welch, supra,* p. 309) that the specific amendments here involved are an adjunct to the broad general provisions taxing transfers intended to take effect in possession or enjoyment at or after the grantor's death, and they were expressly designed to overcome the effect of *May* v. *Heiner,* 281 U. S. 238, and other cases following it (*Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784). The life estate in *May*

v. *Heiner* was apparently a contingent one (see 281 U. S. 238, 243), and it seems highly improbable that Congress in amending the law did not intend to cover cases of the very sort considered in *May* v. *Heiner*. Certainly it is plain that where as here the grantor of a trust reserves a contingent life interest in the trust income, the ripening of full dominion over the property by the remainderman is necessarily postponed until after the grantor's death.

In the application for certiorari, the taxpayer does not contend that there is a conflict of decisions in the Circuit Courts of Appeals, but urges (Pet. 4–5) that the question involved is important and the decision of the Circuit Court of Appeals is wrong. The taxpayer says (Pet. 10) that there was no possibility that the corpus would revert to the grantor in the instant case and we agree; but that does not preclude taxation by virtue of the specific amendments for they do not depend upon the existence of a possibility of reversion. The arguments on pages 10–20 of the petition for certiorari are discursive and largely beside the point, which is, as above stated, whether the reservation by the grantor of the contingent interest in the trust income amounted to a reservation of the right to the income for a period not ascertainable without reference to the grantor's death within the meaning of the statute. Indeed, it will be noted that the taxpayer relies (Pet. 12–13) upon the reasoning in *Helvering* v. *St. Louis*

Trust Co., 296 U. S. 39, to support her position here, and of course that reasoning was repudiated when this Court specifically overruled the *St. Louis Trust Co.* case in *Helvering* v. *Hallock*, 309 U. S. 106.

The taxpayer intimates without citation of authority (Pet. 25) that the grantor's contingent life estate could have been terminated during his lifetime by joint action of his sister and the trustees. This contention appears to be interjected into the case for the first time here and it is not discussed by either of the courts below. It is based upon a provision in the trust instrument (R. 23) giving the sister power to alter or amend the trust agreement with the consent of the trustees. It would seem that this power contemplated such changes in administration as might be necessary or appropriate to carry out the donor's intent, and it is indeed doubtful whether it could have been exercised so as to terminate the grantor's retained interest (cf. *Helvering* v. *Stuart*, 317 U. S. 154, 164). In any event, no attempt was ever made to deprive the grantor of his retained interest and so long as he had it nobody except his sister could enjoy the income until after he died. Cf. *Goldstone* v. *United States*, 325 U. S. 687, 692–693. And her outstanding interest has been excluded in determining the tax. See *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, 112, 113.

CONCLUSION

The decision is correct; there is no conflict; and the petition for certiorari should be denied.

Respectfully submitted,

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JUNE, 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *.
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent,

whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate. (See section 81.15.)

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